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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. IRVINE RICARDO PEREZ, Defendant and Appellant.	B216316 (Los Angeles County Super. Ct. No. GA069606)

APPEAL from the judgment of the Superior Court of Los Angeles County. Stanley Bumenfeld, Judge. Affirmed.

Law Offices of G. Martin Velez and George Martin Velez, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Irvine Ricardo Perez sexually attacked six women. He was convicted on four counts of misdemeanor sexual battery (Pen. Code, § 243.4, subd. (e)(1), counts 3, 4, 6 and 7), one count of misdemeanor indecent exposure (Pen. Code, § 314, subd. (1), count 5), and one count of felony sexual battery by restraint (Pen. Code, § 243.4, subd. (a), count 2). In this appeal, defendant addresses only the felony sexual battery conviction in count 2. First, defendant contends the term "groin," as used in Penal Code section 243.4 (Section 243.4), is unconstitutionally vague. Second, defendant contends the record lacks substantial evidence to support the count 2 conviction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *Counts 3, 4, 5, 6, 7.*

On October 11, 2006, defendant followed Ashley B. as she walked home from school. Defendant came toward her, "grabbed [her] butt and then he kind of pushed [her] against the wall." After Ashley yelled, defendant ran away. (Count 4.)

On November 10, 2006, Maureen M. was walking near where she lived. Defendant ran up from behind Maureen, cupped her buttocks with his hand, and then ran away. (Count 7.)

On April 19, 2007, Alexandria M. was walking to her friend's home. Defendant drove his truck in front of Alexandria, jumped out, ran toward her, and put one hand on her breast and the other on her buttocks. Defendant got back into his truck and drove off. (Count 6.)

On April 25, 2007, Audrey M. was driving on the freeway when she noticed she was being paced by a vehicle driven by defendant. Defendant followed as Audrey exited the freeway and stopped at a red light. Defendant got out of his truck and stood next to Audrey's car. Defendant's pants were unzipped and he was masturbating. Audrey panicked and drove through the red light. When she stopped at the next red light, defendant drove next to Audrey's car, stepped out of his vehicle, walked to the side of

Audrey's car, and masturbated. Audrey drove away, with defendant following. He then drove off. (Count 5.)

On May 3, 2007, D.H. drove her vehicle through the electronic parking gate at her apartment building. When defendant tried to follow D.H. into the complex, his truck got stuck in the closing gate. Defendant exited his truck, climbed over the gate, and jumped on D.H. from behind. He placed one hand on her shoulder and forcefully rubbed her buttocks with the other hand. Defendant ran away after D.H. screamed. (Count 3.)

b. *Counts 1 and 2.*

On May 3, 2007, at approximately 2:00 a.m., Jami R. was driving in Burbank, California. She was wearing a knee-length tube dress. She pulled her car to the curb so she could look for a compact disc. She looked up and saw defendant standing at her passenger door. Before Jami could lock her doors, defendant opened the passenger door and leaned on the passenger seat, with his legs extended outside the car. Defendant "immediately started reaching for [Jami's] crotch area with his hands." Jami used her right hand to push defendant's head against the windshield. She was pressed against the driver's door.

Defendant's hands were on Jami's legs. Defendant tried to "separate [Jami's] legs with his hands[,]" forcing her dress upwards. Jami resisted. She tried to keep her legs together and push his hands off her legs. However, defendant's hands "kept moving up [Jami's] legs on [her] inner thigh trying to separate [her] legs and trying to reach [her] groin area, [her] vaginal area, [her] crotch." Defendant's hands were on her inner thigh at the crease of her leg and her vaginal area when he grabbed Jami's crotch around her underwear. Defendant applied sufficient force to leave a blood blister on the inside of Jami's right leg. Defendant continued to reach for Jami's vaginal area. She fought back, attempting to push him off her and keep her legs together. Jami could feel defendant's fingers on the outside of her panties in her crotch area, where her panties met her legs, skin to skin. Defendant tried to move her panties for the purpose of touching her vagina. Defendant then left the vehicle and fled. In court, Jami demonstrated the area of her body

where defendant touched her by putting her hands in the shape of a "V" on her skirt, at what would be her panty line.

2. *Procedure.*

Trial was by jury. In answering the jury's inquiry if it could be "given a legal definition of groin[,]" the court referred the panel to CALCRIM No. 200. This instruction read in part, "[w]ords and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings."

On counts 3, 4, 6, and 7 (victims D.H., Ashley, Alexandria, and Maureen), defendant was convicted of misdemeanor sexual battery (§ 243.4, subd. (e)(1)). On count 5 (victim Audrey), defendant was convicted of indecent exposure, a misdemeanor (Pen. Code, § 314, subd. (1).) With regard to victim Jami, defendant had been charged in count 1 with assault with intent to commit rape, sodomy, or oral copulation (*id.*, § 220, subd. (a)) and in count 2 with felony sexual battery by restraint (§ 243.4, subd. (a).) Defendant was acquitted on count 1 and convicted on count 2.

The court sentenced defendant to two years in state prison on count 2, and an additional one year and eight months for the other counts, to be served in any state facility.

DISCUSSION

1. *The term "groin" in Section 243.4 is not unconstitutionally vague.*

Defendant contends the count 2 conviction for felony sexual battery by restraint must be reversed because the term "groin" in Section 243.4, is unconstitutionally vague. This contention is not persuasive.

"Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." (*United States v. Williams* (2008) 553 U.S. 285, 304.) "The due process concept of fair warning is the underpinning of the vagueness doctrine, which 'bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." ' [Citations.] . . . [T]he United States Supreme Court had this to say on the topic: 'Vagueness may invalidate a

criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.' (*Chicago v. Morales* (1999) 527 U.S. 41, 56.)" (*People v. Castenada* (2000) 23 Cal.4th 743, 751.)

" 'Two principles guide the evaluation of whether a law . . . is unconstitutionally vague. First, "abstract legal commands must be applied in a specific context. A contextual application of otherwise unqualified legal language may supply the clue to a law's meaning, giving facially standardless language a constitutionally sufficient concreteness." (*People ex rel. Gallo* [*v. Acuna* (1997)] 14 Cal.4th [1090,] 1116.) Second, only reasonable specificity is required. (*Id*. at p. 1117.) Thus, a statute "will not be held void for vagueness 'if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources.' " (*Ibid*.)' [Citation.] [¶] Terms that might otherwise be considered vague may meet the standard of reasonable certainty when considered in context with other terms, and in view of the legislative purpose. (*People ex rel. Gallo v. Acuna*, *supra*, 14 Cal.4th at pp. 1116-1118.)" (*People v. North* (2003) 112 Cal.App.4th 621, 628, followed by *People v. Gonzales* (2010) 183 Cal.App.4th 24, 38-39; see also, *People v. Tapia* (2005) 129 Cal.App.4th 1153, 1166-1167.)

Following the usual rules of statutory construction, we first examine the statutory language. Words should be given the meaning they bear in ordinary use. If the words are clear and unambiguous there is no need for construction, nor is there a need "to resort to indicia of the intent of the Legislature . . . ." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; followed by *People v. Barasa* (2002) 103 Cal.App.4th 287, 291-292.) However, these rules do not prohibit us from construing the words in context, in light of the purpose of the statute. (*Lungren v. Deukmejian*, *supra*, at p. 735.)

Section 243.4 reads in part:

"(a) Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against

the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. . . .

"[¶] . . . [¶]

"(f) As used in subdivision[] (a) . . . 'touches' means physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense.

"(g) As used in this section, the following term[has] the following meaning[]:

"(1) 'Intimate part' means the sexual organ, anus, groin, or buttocks of any person, and the breast of a female."

In enacting Section 243.4 to establish the offense of sexual battery by restraint, the Legislature intended to criminalize sexually abusive behavior that was more physically traumatic and psychologically terrifying than misdemeanor sexual assault or battery, even though the conduct fell short of the completed acts of rape, sodomy, or oral copulation. (*People v. Arnold* (1992) 6 Cal.App.4th 18, 25 (*Arnold*); *People v. Alford* (1991) 235 Cal.App.3d 799, 803; Sen. Com. on Judiciary, Background Information on Assem. Bill No. 2721 (1981-1982 Reg. Sess.) as amended April 15, 1982, p. 4; Assem. Speaker Pro Tempore Leo McCarthy, press release re Assem. Bill No. 2721, June 15, 1982; Sen. Republican Caucus, analysis of Assem. Bill No. 2721 (1981-1982 Reg. Sess.) as amended August 3, 1982.) "Accordingly, the statute allows for felony prosecution when a touching occurs while the person is unlawfully restrained and against the person's will and is committed for a sexual purpose." (*People v. Alford*, *supra*, at p. 803.) The Legislature defined those intimate parts of the body a reasonable person would consider private with respect to being touched by another. As shown above, the definition of "intimate parts" included the term "groin." (Cf. Civ. Code, § 1708.5, sexual battery [using the same definition of "intimate part"].)

The common, ordinary meaning of the term "groin" is one found in the Attorneys' Dictionary of Medicine and Word Finder: "The groove, and the part of the body around it, formed by the junction of the thigh with the abdomen, on either side." (3 Schmidt, Attorney's Dict. of Medicine and Word Finder (2009) p. G-154.) This definition is

virtually identical to those definitions used in other jurisdictions. For example, in *State v. Doe* (N.M.Ct.App. 1979) 598 P.2d 1166, a New Mexico Court of Appeals defines the term as: "the fold or depression marking the line between the lower part of the abdomen and the thigh; also: the region of this line." (*Id.* at p. 1167, quoting Webster's 3d New Internat. Dict. (1966).)[1] A Maryland court has defined "groin" as " 'the name applied to the region which includes the upper part of the front of the thigh and lower part of the abdomen. A deep groove runs obliquely across it, which corresponds to the inguinal ligament, and divides the thigh from the abdomen.' " (*Elias v. State* (Md.Ct.App. 1995) 661 A.2d 702, 705, fn. 5, quoting Black's Medical Dict. (31st ed. 1976) p. 393.) Defendant cites sources providing virtually identical definitions. For example, defendant notes that the American Heritage Dictionary of the English Language defines groin as "the crease or hollow at the junction of the inner part of each thigh with the trunk, together with the adjacent region and often including the external genitals." (American Heritage Dict. (3d ed. 1992) p. 798.)

All of these definitions use slightly different words to describe the same area of the body -- the junctional region of the body including the front, upper part of the thigh towards the inside, up to the lower part of the abdomen, including the crease at the top of the thigh and including the genitals. An ordinary person of common intelligence would understand this to be the meaning of the term "groin," as it is well understood in common parlance. As the trial court recognized when it re-instructed with CALCRIM No. 200, there is no specific "legal" definition of this term. Because the term "groin" has an accepted and easily understood definition, its use in Section 243.4 provides constitutionally adequate notice and does not authorize nor encourage arbitrary and discriminatory enforcement. Thus, the term is not unconstitutionally vague.

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1 *State v. Doe*, *supra*, 598 P.2d 1166, has been superseded by statute on other grounds as stated in *State v. Michael R.* (N.M.Ct.App. 1988) 765 P.2d 767, 768-769.)

2. *There is substantial evidence to support the count 2 conviction.*

Defendant raises two substantial evidence arguments. He argues there were insufficient facts to prove he touched Jami's groin. He also argues there were insufficient facts to prove he unlawfully restrained Jami. These arguments are not persuasive.

"The standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] ' "[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." ' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66, followed by *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1572.)

Unlike misdemeanor sexual battery (§ 243.4, subd. (e)), a felony sexual battery by restraint (§ 243.4, subd. (a)) requires the perpetrator to make direct contact with the skin of the victim's intimate parts. (§ 243.4, subd. (f) [defining "touches"]; *People v. Elam* (2001) 91 Cal.App.4th 298, 309-310; *People v. Dayan* (1995) 34 Cal.App.4th 707, 715-716.)

Defendant points to *Arnold*, *supra*, 6 Cal.App.4th 18, to suggest the record lacks substantial evidence proving he touched Jami's groin. In *Arnold*, the Fifth Appellate District discussed at length the requirement that in order for there to be a violation of Section 243.4, the victim must be "unlawfully restrained" by the accused. The court then examined a number of different episodes in which a student victim was touched by her algebra instructor. One episode was described as when the "defendant put his hand down [the student's] shorts almost to the top of her underwear." (*Arnold*, at p. 31.) *Arnold* rejected the People's argument that these acts violated Section 234.4, in part because "[t]here was no evidence that defendant made *physical contact* with the *skin* of [the victim's] groin." (*Arnold*, at p. 31, italics added.) Thus, in *Arnold*, the defendant tried to reach the vaginal area from the top of the victim's underwear, but the defendant's skin never touched the skin of the victim's groin.

In contrast to *Arnold, supra,* 6 Cal.App.4th 18, here, defendant pushed Jami's dress upward as his hands moved up her leg from the inner part of her thigh to the crease, where her legs ended, and to her crotch. As Jami described it, defendant "grabbed my crotch around my underwear." His hands were "right at the crease. They were . . . on my legs right at the crease of my leg and where my vaginal area is." She felt his fingers touch her skin to skin on the outside of her panties where her panties met her legs. Jami demonstrated the area of the touching, by forming her hands in the shape of a "V" and placing her hands on her skirt at what would be her panty line. There is substantial evidence defendant touched Jami's groin, skin to skin.

Further, the record provides substantial evidence defendant unlawfully restrained Jami. To violate Section 243.4, the victim must be unlawfully restrained by the perpetrator. "[A] person is unlawfully restrained when his or her liberty is being controlled by words, acts or authority of the perpetrator aimed at depriving the person's liberty, and such restriction is against the person's will; a restraint is not unlawful if it is accomplished by lawful authority and for a lawful purpose, as long as the restraint continues to be for a lawful purpose. The 'unlawful restraint required for violation of section 243.4 is something more than the exertion of physical effort required to commit the prohibited sexual act.' (*People v. Pahl* [1991] 226 Cal.App.3d [1651,] 1661.)" (*Arnold, supra,* 6 Cal.App.4th at p. 28.)

Defendant used considerable effort beyond what was required to accomplish the unlawful touching of Jami. He prevented Jami from locking the doors to her car. The force applied by defendant on Jami was so great as to cause a blood blister. Defendant pinned Jami up against the door of her own car as he groped her. He forced Jami to use her hands to protect herself, rather than to escape through her unlocked driver's door. Thus, even though Jami's driver's door was unlocked, defendant created a coercive atmosphere and restricted Jami's movements resulting in an unlawful restraint. Defendant's conduct was more than the exertion of physical effort required to touch Jami's groin and was an unlawful restraint. (E.g., *Arnold, supra,* 6 Cal.App.4th at p. 31 [instructor defendant created coercive atmosphere and increased student's isolation and

feelings of isolation when his authoritative position, words, and acts restrained student against her will and limited her avenue of escape by blocking one exit with mat, and then putting his hands down her top, touching her breast under her brassiere, even though student was able to escape through another door].)

There was substantial evidence to support the count 2 conviction.

DISPOSITION

The judgment is affirmed.

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GRIMES, J.

We concur:

RUBIN, ACTING P. J.

FLIER, J.